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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

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| In the Matter of |) | |
| |) | |
| W. O., |) | OHA Case No. 12-FH-2052 |
| |) | |
| Claimant. |) | Agency Case No. |
| _____ |) | |

FAIR HEARING DECISION

STATEMENT OF THE CASE

W. O. (Claimant) receives Medicaid coverage under the Mentally Retarded/Developmental Disabilities Home and Community-Based Waiver (Waiver) category. (Ex. D, p. 2) The Claimant, as part of his Waiver Plan of Care (POC) renewal, for the plan year from April 13, 2011 through April 12, 2012, requested that he receive an Acuity Add-On payment rate. (Ex. E, p. 4) The Division of Senior and Disabilities Services (Division) sent the Claimant's legal guardian (Guardian) notice on June 15, 2011, that his request for an Acuity Add-On payment rate was denied. (Ex. E, pp. 1 – 3) The Division then rescinded the denial, reconsidered the Acuity Add-On payment rate request, and on September 20, 2011, again notified the Guardian that the request for an Acuity Add-On payment rate was denied. (Ex. D, pp. 2 – 4) On January 26, 2012, because the Guardian had not received the September 20, 2011 denial letter, the Division resent the September 20, 2011 denial to the Guardian. (Ex. D, p. 1) The Guardian, acting on the Claimant's behalf, requested a Fair Hearing on February 17, 2012. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant's hearing was held on March 15, 2012. The Claimant did not appear. He was represented by his legal guardian, R. B., who appeared telephonically and testified on his behalf. K F, the Executive Director of No Name Community Services, appeared telephonically and testified on the Claimant's behalf.

Gerry Johnson, a Medical Assistance Administrator III employed by the Department, appeared in person. He represented and testified on behalf of the Division. Peggy O'Neal, a Health Program Manager employed by the Division, attended telephonically and testified on behalf of the Division.

ISSUE

Was the Division correct to deny the Claimant's request for an Acuity Add-on rate?

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. The Claimant receives Medicaid coverage under the Mental Retardation and Developmental Disabilities Home and Community-Based Waiver category ("Medicaid Waiver"). (Ex. E, p. 6) He experiences a variety of conditions, which include Autistic Disorder and mild mental retardation. *Id.*
2. The Claimant resides in a group home, where he is the only resident. (O'Neal testimony; F testimony)
3. The Claimant engages in both self-injurious and assaultive behaviors. These behaviors consist of such items as throwing a glass and plates at group home staff, throwing a television, biting others, biting himself, shoving and hitting others.¹ These behaviors do not occur daily, but do occur relatively frequently.² The Claimant's behavior has resulted in him being unable to participate in supported employment. (Ex. F, p. 2) It has also resulted in him seriously injuring a fellow student during summer school. *Id.* His behavior has also resulted in his group home provider supplying a staff member to accompany him when he goes to school as a safeguard. *Id.*
4. The Group Home staff are normally able to calm the Claimant down by redirecting him. (Ex. E, p. 13) The Claimant "is easily redirected to another area or activity." (Ex. E, p. 12)
5. The Claimant experiences both bowel and urinary incontinence, where he needs to be reminded to use the bathroom. (Ex. E, pp. 11, 14) He occasionally soils his bed at night. *Id.* The Claimant also does not sleep through the night most of the time. During the time period from February 9, 2012 through February 28, 2012, he only slept through the entire night three times. (Ex. G, p. 2) During that same time period, he needed assistance on 6 nights due to incontinence. *Id.*

¹ See Ex. E, pp. 7 – 9.

² March 2010, five separate incidents (biting, throwing a television, throwing glasses); April 2010, one incident (throwing television); May 2010, no incidents; June 2010, one incident (bite marks and bruises on arm); July 2010, no incidents; August 2010, one incident ("charging" employees at No Name); September 2010, no incidents; October 2010, eight incidents (hit person at No Name with shopping cart, threw a plate, biting hand, "body slammed" a car hard enough to dent the door, attempted to throw a TV and a blender); November 2010, two incidents (threw up and bit himself); December 2010, eight incidents (tipping over a TV and a DVD player, threw a plate, knocked a plate out of staff hands and hit the staff member, bit his own hand, attacked a staff member, had an outburst at school, throwing a DVD player); January 2011, five incidents (hitting/pushing staff, biting himself, throwing a plate); February 2011, nine incidents (four on one day, hitting staff and charging staff, biting, trying to tip TV over, trying to pull a shelf down, throwing a DVD player, throwing a plate); March 2011, five incidents (throwing a TV, DVD, glass, plate, biting hand, hitting staff, tipping over TV); April 2012, two incidents on the same day (biting hand, becoming upset and having to leave a "peer's home.").

6. The Claimant, as part of his Waiver Plan of Care (POC) renewal, for the plan year from April 13, 2011 through April 12, 2012, requested that the Division approve the following:

- a. Group Home services, 365 days per year.
- b. Supported Employment services, 10 hours per week.
- c. Day Habilitation services, 6 hours per week.
- d. Acuity Add-On payment rate.

(Ex. E, pp. 16, 19, 20)

7. The Division of Senior and Disabilities Services (Division) sent the Claimant's legal guardian (Guardian) notice on June 15, 2011, that his request for an Acuity Add-On payment rate was denied. (Ex. E, pp. 1 – 3) The Division then rescinded the denial, reconsidered the Acuity Add-On payment rate request, and on September 20, 2011, again notified the Guardian that the request for an Acuity Add-On payment rate was denied. (Ex. D, pp. 2 – 4) The Division's September 20, 2011 denial letter stated several reasons for the denial:

- a. The applicable regulation, 7 AAC 145.520(m) requires “dedicated one-on-one staffing 24 hours per day.” While the Claimant “currently receives Residential Habilitation Group Home service which provides staffing 24 hours per day, 7 days per week,” he does not require dedicated one-on-one staffing 24 hours per day. (Ex. D, p. 3) “Providing one-on-one direct assistance throughout the night does not appear to be necessary.” *Id.*
- b. Because the Claimant attends school in the special education program, and should be receiving individualized supports as part of his Individualized Education Plan, the Medicaid Waiver program does not allow him to receive waiver services for items that should be covered as part of his special education services. (Ex. D, p. 3)

8. Peggy O'Neal, who is a Health Program Manager employed by the Division, testified as follows:

- a. The Claimant has very high needs. He is the sole resident of a group home and the current services he receives are adequate to prevent his institutionalization.
- b. In order to qualify for an Acuity Add-On payment rate, the Claimant must require direct care, not observation and/or monitoring, 24 hours per day, 7 days per week.
- c. The Claimant does not require direct care 24 hours per day, 7 days per week.

9. The Claimant is not requesting additional services. (F testimony) Instead, he is requesting the Acuity Add-On payment rate because he receives one-on-one 24 hour staffing. *Id.*

10. The Claimant used to be in an institution in Texas. When he left that institution, he could barely communicate. Since his relocation to Alaska and his current group home, he has improved dramatically. (B. testimony)

PRINCIPLES OF LAW

A party who is seeking a change in the status quo has the burden of proof. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). The normal standard of proof in an administrative proceeding, unless otherwise stated, is the preponderance of the evidence standard. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). “Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the [triers of fact] that the asserted facts are probably true.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

The Medicaid program has a number of coverage categories. *See* 7 AAC 100.002. One of those coverage categories is the Home and Community-Based Waiver program (“Medicaid Waiver”). 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver services, reads in pertinent part as follows:

Sec. 47.07.045. Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 U.S.C. 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment for the services.

The Medicaid program pays for specified individual services to Medicaid Waiver recipients. 7 AAC 130.230(c). The Division must approve each specific service as part of the Medicaid Waiver recipient’s plan of care. 7 AAC 130.230(f). Each service must be “of sufficient amount, duration, and scope to prevent institutionalization.” 7 AAC 130.230(f)(1). A Medicaid Waiver recipient’s plan of care is subject to review on a yearly basis. 7 AAC 130.230(g).

A Medicaid Waiver recipient who receives group home habilitation services (residential habilitation services)³ may receive an Acuity Add-on rate, which is paid to the provider:

A qualified recipient receiving residential supported-living services . . . is eligible for an acuity rate of \$320 per approved day in addition to the qualified recipient’s daily rate provider for under (f) and (h) of this section. For purposes of this subsection, a qualified recipient is a recipient whose plan of care developed and

³ *See* 7 AAC 130.265.

approved under 7 AAC 130.230 documents and requires that the recipient receive dedicated one-on-one staffing 24 hours per day.

7 AAC 145.520(m).⁴ The Alaska Medicaid regulations do not define the term “dedicated one-on-one staffing.”

ANALYSIS

The Claimant is the party who requested a change in the status quo, because he requested that his Medicaid Waiver Plan of Care be changed to add an Acuity Add-On payment rate. The Claimant therefore has the burden of proof by a preponderance of the evidence.

An Acuity Add-On payment rate is a payment made to a group home provider for a specific resident of the group home, which is made in addition to the regular payment rate for the group home. *See* 7 AAC 145.520(m).

There are two regulations, 7 AAC 130.230(f) and 7 AAC 145.520(m), that must be taken into account when determining the issue of whether the Claimant is entitled to receive an Acuity Add-On payment rate. First, 7 AAC 130.230(f) requires that in order for a Claimant to have a specific item included as part of his plan of care, the service must be necessary to avoid institutionalization. Second, 7 AAC 145.520(m), states that in order for a Claimant to receive the additional Acuity Add-On payment rate, the Claimant must require “dedicated one-on-one staffing 24 hours per day.” *See* 7 AAC 145.520(m). Reading these two regulations together, the Claimant is entitled to receive an Acuity Add-On payment rate if he requires dedicated one-on-one staffing 24 hours per day in order to avoid institutionalization. This means that the Claimant’s needs must be intensive enough that he requires one staff person providing actual care for him and him alone (“dedicated one-on-one”), 24 hours per day, in order to avoid institutionalization

The Claimant’s position is that because he is the sole resident of his group home, which means that all staff time is devoted to him exclusively, that he requires dedicated one-on-one staffing 24 hours per day. The Claimant is not requesting additional services, but instead an additional payment for already provided services because he is the sole resident of his group home. The Claimant’s argument, followed to its logical conclusion, would enable any person who is the sole resident of a group home, regardless of his care needs, to receive an Acuity Add-On payment rate.

The facts of this case demonstrate that the Claimant has high needs due to his behavior. He is the sole resident of his group home. While the Claimant certainly engages in self-destructive and assaultive behaviors, the record shows that these behaviors are intermittent, may not occur for a

⁴ 7 AAC 145.520(m) was amended effective April 1, 2012. (Register 201). This Decision relies upon the version of 7 AAC 145.520(m) that was in effect as of September 20, 2011, when the Division issued its denial. (7 AAC 145.520(m) as amended effective March 1, 2011, Register 197).

month, and then he may act out multiple times in a single day.⁵ The Claimant's behaviors are easily redirected.

In addition, while the record shows that the Claimant experiences nighttime incontinence, this is not a daily occurrence, nor does it require constant attendance upon the Claimant. Certainly, the group home staff need to be attentive and monitor the Claimant. However, the facts of this case do not demonstrate that the Claimant has a need for one-on-one dedicated 24 hour services. The Claimant also did not present any evidence that he was at risk of institutionalization if he did not receive the Acuity Add-On payment rate.

In conclusion, the Claimant has not demonstrated that he requires "dedicated one-on-one staffing 24 hours per day," in order to avoid institutionalization. He therefore has not met his burden of proof by a preponderance of the evidence and has not demonstrated that he is entitled to receive an Acuity Add-on rate. The Division was therefore correct when it denied the Claimant's request for an Acuity Add-on rate.⁶

CONCLUSIONS OF LAW

The Claimant had the burden of proof by a preponderance of the evidence in this case. He did not meet his burden of proof and failed to establish that he required dedicated one-on-one 24 hour staffing in order to avoid institutionalization. As a result, he is not entitled to receive an Acuity Add-on payment rate.

DECISION

The Division was correct when it notified the Claimant on September 20, 2011, that his request for an Acuity Add-On payment rate as part of his 2011 - 2012 Medicaid Waiver Plan of Care adding an Acuity Add-on rate, was denied.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision. To appeal, send a written request directly to:

Director of the Division of Senior and Disabilities Services
550 W 8th Ave.
Anchorage, AK 99501

⁵ See fn. 2 above.

⁶ Because this Decision finds for the Division upon the grounds that the Claimant does not require dedicated one-on-one 24 hours staffing, it is not necessary to address the Division's alternative argument that the Claimant's receipt of individualized supports under his Individualized Education Plan precludes him from receiving an Acuity Add-On payment rate. See Ex. D, p. 3.

